FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.
No. 262.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MILTON H. TUCKER,
ROBERT T. BURCH,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

No. 262.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The Brief for the Board in opposition monotonously repeats the same factual misstatements as were made by the Trial Examiner in his Intermediate Report and repeated in the Board's decision and in its brief below. We have, before the Board and in the Court below, systematically and painstakingly pointed out the errors contained in these statements, but still the Board persists

in their repetition. We have shown that the material findings of the Board are not supported by substantial evidence, and that the inferences drawn by the Board have no basis in fact; and we have shown that many of the findings are inexcusably careless, and that some of them are even intentionally erroneous.

The Court below impliedly concedes that we demonstrated the insufficiency of the evidence to support the separate findings of the Board by focusing attention "separately upon each of the incidents" (Tr. VIII, 9), but the Court said that this demonstration was immaterial, because of the broad power of the Board to draw inferences from the accreted force of such incidents in their setting of totality. The Board has not met our challenge of the correctness of this holding merely by repeating the statements which the Court below impliedly concedes are not supported by the evidence when attention is focused upon them separately.

It appears, therefore, to be unnecessary for us to demonstrate again that the Board's statements are not supported by the evidence when attention is focused upon them separately and, indeed, the length of the record in this case makes it impossible to do so in this Reply Brief, which must be concise. The examples set forth in our original brief in support of the Petition for Certiorari are, we believe, sufficient proof for present purposes of the unreliability of the Board's statements.

ARGUMENT.

A. The Rule Against Solicitation.

The Brief for the Board in opposition argues, as the Court below held, that the validity of the Petitioner's rule against solicitation is not a question which is open to the Court, but that the courts are bound by the Board's holding on this matter. The Board contends that in **Republic Aviation Corp. v. National Labor Relations Board and National Labor Relations Board v. Le Tourneau Co. of Georgia**, 324 U. S. 793, this Court, by "explicit statement", renounced the power of the Court over this question of law, and delegated it exclusively to the Board.

The Board has ignored the fact that by the express language of the Act the Court's power "to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board" is limited only by the language "The findings of the Board as to **facts**, if supported by evidence, shall be conclusive" (29 USC, Sec. 160 [e]). In other words, only the Board's fact-finding power is conclusive.

The Board relies upon the following language of the Republic Aviation case:

> "The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus, a 'rigid scheme of remedies' is avoided and administrative flexibility within

> appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation" (l. c. 798).

This language may support the Board's authority to issue an order directing an employer to rescind or modify a rule, but it certainly does not say or imply that the Board's decision on the question of reasonableness is conclusive and exempt from judicial review. In this case the facts upon which the question of reasonableness depends are undisputed, and the Board does not base its contention for the conclusiveness of its decision upon any question of conflicting testimony, but purely upon its asserted power to decide finally the question of law, exempt from judicial review.

The reasonableness of Petitioner's rule is necessarily a question of law. What else could it be? There is no dispute about the facts and, as this Court said in the case of **Nelson v. Montgomery Ward Co.**, 312 U. S. 373, 376:

> "The effect of admitted facts is a question of law. Swift & Co. v. Hocking Valley R. Co., 243 U. S. 281, 61 L. ed. 722, 37 S. Ct. 287; Sanford v. Commissioner of Internal Revenue, 308 U. S. 39, 51, 84 L. ed. 20, 26, 60 S. Ct. 51."

In the case of **Midland Steel Products Co. v. National Labor Relations Board** (CCA 6), 113 F. 2d 800, 805, the Court said:

> "Whether this rule was reasonable is a question of law for the court to determine. Little Rock & M. Rd. Co. v. Barry, 8 Cir., 84 F. 944, 43 L. R. A. 349; Missouri, K. & T. Ry. Co. v. Collier, 8 Cir., 157 F. 347; Chicago, R. I. & P. Ry. Co. v. Ship, 8 Cir., 174 F. 353; Central Rd. Co. of New Jersey v. Young, 3 Cir., 200 F. 359, L. R. A. 1916E, 927."

But the brief for the Board in opposition says:

> "* * * certiorari was expressly granted in the Republic Aviation case because it was in conflict with the Midland Steel case, among others (see 324 U. S. at p. 796, fn. 2) and that in affirming the Republic Aviation decision, this Court necessarily disapproved the Midland Steel decision."

We do not understand that the action of this Court in affirming a decision necessarily has the effect of disapproving everything held in the cases mentioned as being in apparent conflict for the purpose of granting a writ of certiorari, in the absence of language in the Court's opinion which is contrary to the decision claimed to have been disapproved. Doubtless the decision of this Court in the Republic Aviation case does limit the effect of the Midland Steel case to the extent that it approves the Board's presumption with respect to a rule against solicitation, but certainly it does not disapprove the holding in the Midland Steel case that a question of reasonableness is a question of law, and that the Board's decision on such question is subject to review by the courts. In the Republic Aviation case this Court held:

> "The Board has fairly, we think, explicated in these cases the theory which moved it to its conclusions in these cases. The excerpts from its opinions just quoted show this. The reasons why it has decided as it has are sufficiently set forth. We cannot agree, as Republic urges, that in these present cases reviewing courts are left to 'sheer acceptance' of the Board's conclusions or that its formulation of policy is 'cryptic'. See Eastern-Central Motor Carriers Asso. v. United States, 311 U. S. 194, 209, 88 L. ed. 668, 678, 64 S. Ct. 499.
>
> "Not only has the Board in these cases sufficiently expressed the theory upon which it concludes that rules against solicitation or prohibitions against the

wearing of insignia must fall as interferences with union organization, but, in so far as rules against solicitation are concerned, it had theretofore succinctly expressed the requirements of proof which it considered appropriate to outweigh or overcome the presumption as to rules against solicitation. In the Peyton Packing Co. Case, 49 N. L. R. B. (F) 828, at 843, hereinbefore referred to, the presumption adopted by the Board is set forth.

* * * * * * *

"**We perceive no error in the Board's adoption of this presumption.** The Board had previously considered similar rules in industrial establishments and the definitive form which the Peyton Packing Co. decision gave to the presumption was the product of the Board's appraisal of normal conditions about **industrial establishments.** Like a statutory presumption or one established by regulation, the validity, perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred." (l. c. 803, 804.)

As we understand that language, this Court has held that the Board is justified in establishing its presumptions and requirements of proof with respect to rules against solicitation, and that in the absence of evidence the presumption will prevail. That presumption, however, has nothing to do with this case. In this case the Board itself has found that special circumstances exist which render it proper to put limitations on the use of the employees' own time. **This case involves a retail store, not an industrial plant**, and the Board has recognized the difference and has held that its presumption is inapplicable. Under such circumstances the decision in the Republic Aviation case is not in point. And it certainly does not mean (as the Court below assumed) that the Court does not have the **power** to review the Board's decision as to the reasonableness of a rule.

The question presented to the Court below was whether or not the Petitioner's rule is reasonable. Clearly that is a question of law which should have been considered by the Court below, but the Court refused to review and decide the question under the mistaken belief that the Board's decision was binding upon it (Tr. VIII, 6). If this decision is permitted to stand, it means that the Courts have renounced the right of judicial review on questions of law decided by the Board. This is clearly contrary to the express language of the Act, which provides only that the Board's decisions on questions of fact, if supported by evidence, are conclusive.

This case presents an important question of wide public interest, which should be decided by this Court, as to the reasonableness and validity of the rule against solicitation in a retail department store, and as to the power and jurisdiction of the Board to substitute an arbitrary and unworkable rule for the rule which has been traditionally adopted and enforced in all retail department stores, and recognized by labor unions in contracts. It is clear that the Act does not make the Board's decision on this question binding upon the Courts, and that the holding of the Court below to that effect is erroneous and sets a dangerous precedent; and that the need for certiorari is evident. The brief in opposition wholly fails to meet our contention, but on the contrary, it merely reasserts the Board's claim that its decision is as conclusive on this question of law as on a question of fact.

B. Limitations on Inference-Drawing and Fact-Finding Power of the Board.

The Board, in its brief in opposition to the petition for certiorari, has restated the questions presented by the petition, and has thereby completely altered the theory of the questions presented. As stated in the petition for certiorari, the second question presented is:

> "Whether or not the power of the Board to draw inferences permits the Board, and requires the reviewing court, to dispense with the statutory requirement that the Board's findings of fact must be supported by substantial evidence."

The Board, by its restatement, leaves only the question of whether or not the Board's findings of fact are supported by substantial evidence. Thus, the Board's restatement of the question and its argument based upon that restatement, completely avoid the question as presented by the petition, and ignore the fact that the Court below impliedly concedes that we demonstrated the lack of substantial evidence to support the Board's material findings when attention is focused upon them separately (VIII, 9).

The decision of the Court below rests upon its holding that the Board's power to draw inferences replaces the statutory requirement that the Board's findings of facts must be supported by substantial evidence. The only basis for its conclusion that it "must hold that there is sufficient evidence to support each of the Board's material findings" is that it says, in effect, that such a holding is mandatory in view of "the broad scope of inference open to the Board", and "the accreted force which conduct may acquire in its setting of totality", the absence of which may not be demonstrated by focusing separately upon each of the incidents which are said to comprise the "setting of totality" (Tr. VIII, 8, 9). Thus, the Court below holds in effect that the Board's power to draw fact-inferences is practically unlimited, and that if the Board's ultimate findings are supported by the Board's fact inferences, the requirement that the Board's findings must be supported by substantial evidence has been satisfied, and it is then not within the power of the reviewing court "to focus separately upon each of the incidents" or otherwise to determine whether or not the fact inferences are based

upon substantial evidence. It is this holding of the Court below which constitutes a misapplication of the doctrine enunciated in the **Consolidated Edison, Columbia Enameling, and Nevada Consolidated Copper** cases* and which presents a conflict with the decisions of other Circuit Courts of Appeals in the cases cited in the petition for certiorari and the Petitioner's supporting brief.

The emphasis which the Court below places upon "the accreted force which conduct may acquire in its setting of totality" **assumes** that Petitioner engaged in the conduct which the Board, by exercising its broad inference-drawing power, attributed to Petitioner. The holding of the Court below would be sound only if there were substantial evidence that Petitioner **had engaged** in the conduct mentioned in the Board's findings, leaving open only the question as to whether or not that conduct amounted to a violation of the Act. There is, however, no room for the application of the "accreted force" theory until it has first been determined from substantial evidence that the conduct, which creates the "accreted force", has actually been engaged in. It is quite clear that the Court below did not consider the record from this point of view, since it stresses "the broad scope of inference open to the Board" and brushes aside Petitioner's showing that there is no substantial evidence that the conduct was engaged in, by the terse comment that to focus separately upon each of the incidents overlooks the accreted force of the conduct. If the course of conduct which the Board attributes to Petitioner has not been followed, there can be no "accreted force" to support the Board's findings; and Petitioner was entitled "to focus separately upon each of the incidents" alleged by the Board as constituting violations of the Act in order to show that the alleged conduct

* Consolidated Edison Co. of New York, Inc. v. National Labor Relations Board, 305 U. S. 197; National Labor Relations Board v. Columbia Enameling and Stamping Co., Inc., 306 U. S. 292; National Labor Relations Board v. Nevada Consolidated Copper Corporation, 316 U. S. 105.

was not engaged in. The question presented by the petition is whether or not the Board and the reviewing court may thus disregard the substantial evidence requirement of the Act merely by relying upon the inference-drawing power of the Board. It is respectfully submitted that the Board's power to draw inferences is but the complement of its power to find facts. It is not a substitute for substantial evidence.

As authority for the holding of the Court below, the Board cites the opinion of this Court in **Texas and New Orleans R. R. Co. v. Brotherhood of Railway and Steamship Clerks,** 281 U. S. 548, 559-560, wherein this Court said, "Motive is a persuasive interpreter of equivocal conduct, * * *" and that the most that could be said for the employer in that case was that "the evidence permits conflicting inferences, and this is not enough." The Texas and New Orleans case stands for the proposition that where the competent and credible evidence tends to prove unlawful conduct, but of itself is not necessarily inconsistent with lawful conduct, the employer's motive may be taken into consideration and may be sufficient to remove the doubt concerning the unlawfulness of the employer's conduct which would persist otherwise. That case, however, does **not,** as the Board seems to think, stand for the proposition that an employer's **motive** may be substituted for **evidence** of unlawful conduct. This Court, in the Texas and New Orleans case, held, in effect, that after the motive had been considered, and after the employer's activities had been viewed in the light of the motive, the substantial evidence permitted conflicting inferences, either one of which, as this Court held in the Nevada Consolidated Copper case, the Board was free to draw.

In the case at bar, however, there is no competent and credible evidence which tends to prove the unlawfulness of Petitioner's conduct. The Board's material findings and the reviewing court's enforcing order are not sup-

ported, except by incompetent and incredible testimony, and that testimony is viewed in the light of Petitioner's motive, which in turn is inferred by the Board from the same incompetent and incredible evidence. The case at bar, therefore, presents a situation where the evidence fails to establish equivocal conduct which may be shown to be unlawful by reason of Petitioner's alleged motive. In addition, it presents a situation where the evidence fails to permit conflicting inferences and leaves, instead, room but for one inference—that Petitioner, on this record, is not guilty of violating the Act.

The Board points out in its brief that Petitioner's original brief in support of its petition discusses only two* of the eleven alleged discriminatory discharges, and then asserts, upon the authority of Furness, Withy & Co. v. Yang-Tsze Insurance Association, 242 U. S. 430, 434, that Petitioner has failed adequately to raise the question of substantial evidence with respect to any of the unfair labor practices, except the two alleged discriminatory discharges, merely because Petitioner has not made "appropriate references to the record" with respect to the other

* The Board, in effect, confesses the insufficiency of the evidence to support its findings in the two cases (Stewart and Marchand) discussed by Petitioner, by failing even to attempt an answer. It merely refers to its Statement. There is no reference in its Statement to Stewart, except that she was one of those whose violation of Petitioner's rule was investigated by Petitioner's counsel. This matter is fully discussed beginning on page 39 of Petitioner's original brief. As to Marchand, the Board's Statement says that she reported her illness to her superiors. There is evidence that she talked by telephone with some minor supervisors, but the evidence shows that she failed to report her illness to the Employment Office or the Manager of her department and failed to claim her sick benefits from the Welfare Association (as she had done on previous occasions when she was ill, Tr. III, 1736-1737). The record shows that she was not discharged but merely that her name was removed from the pay roll because of her absence and that during that three-months period 113 employees were removed from the pay roll for that reason (Tr. VI, 4395). The Board attempts to brush off the fact that Marchand was told, through her husband, on October 27th "to come in just as soon as she is able to come back to work" (Tr. III, 1733), by saying that this statement was made "by a clerk apparently unfamiliar with Marchand's case"; but the evidence does show that another employee, Wilkins, who was an important member of the Union's Master Committee (Tr. IV, 2816) and who had been taken off the pay roll in the same months, similarly for unexplained absence, testified that after she recovered from her illness she went into the Employment Office and explained the facts and was restored to her position with full seniority (Tr. IV, 2822).

nine. As we pointed out in our original brief, the Board's findings of fact are so shot through with error that the limitation of permissible space in a petition for writ of certiorari and a supporting brief precludes an analysis of all the evidence and an evaluation of each of the Board's findings in the light of that evidence. It was for that reason that only two of the alleged discriminatory discharges were discussed, and the analysis of one witness' testimony was attached as an appendix to the brief. The limitation of our discussion to these particular findings may not be looked upon as a mark of inability to demonstrate a similar failure on the part of the Board to support its other findings by substantial evidence. A review of this case on its merits will reveal that what we have shown with respect to the particular findings discussed may likewise be shown as to the other findings of the Board. Since we have demonstrated the unreliability of the findings, there can be no confidence in those which, for lack of space, could not be discussed in detail.

The opinion of Mr. Justice McReynolds in the Furness, Withy case was provoked by the presentation of a petition for certiorari withholding from this Court information which, had it been known to the Court, would have resulted in a denial rather than the granting of the petition. In his opinion, Mr. Justice McReynolds pointed out that the burden of this Court in disposing of petitions for certiorari is tremendous, and can be promptly discharged only if the petitions "are carefully prepared, contain appropriate references to the record and present with studied accuracy, brevity and clearness whatever is essential to ready and accurate understanding" of points requiring the Court's attention. The limitation of the discussion in our original brief was for the sole purpose of meeting the requirements of brevity and clearness, as outlined in the cited case.

If, as the Board states, the adequacy of the evidence with respect to the two alleged discriminatory discharges

discussed in our original brief presents no question of general importance, the manner in which the Board arrived at its conclusion that the discharges were discriminatory, the manner in which the reviewing court enforced the Board's order, and the substitution of the Board's inference-drawing power for the statutory requirement of substantial evidence by the Board and the reviewing court, do present a question of great general importance. It is that question which is presented by the petition.

CONCLUSION.

Petitioner respectfully submits that the brief for the Board in opposition fails completely to meet the challenge of the petition for a writ of certiorari and our brief in support thereof. The brief in opposition has merely repeated the prejudicial statements heretofore made by the Board and which are not supported by substantial evidence in the record. No attempt has been made to answer the questions raised by the petition, and we think that the Board's failure amounts to a confession of its inability to meet the questions raised.

It is respectfully submitted that this case should be reviewed by this Court as to the validity of a rule against solicitation in a retail department store, and as to whether or not the power of the Board to draw inferences permits the Board, and requires the reviewing court, to dispense with the statutory requirement that the Board's findings of fact must be supported by substantial evidence. Petitioner respectfully renews its prayer that a writ of certiorari issue, as set forth in the petition.

Respectfully submitted,

MILTON H. TUCKER,
ROBERT T. BURCH,
Attorneys for Petitioner.